

FSCA GUIDANCE NOTICE 1 OF 2020 (FAIS)

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002

FINANCIAL SECTOR REGULATION ACT, 2017

GUIDANCE NOTICE ON THE LAPSING OF LICENCES IN TERMS OF SECTION 11 OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002

1. PURPOSE OF THE GUIDANCE NOTICE

The purpose of this guidance notice, which is published by the Financial Sector Conduct Authority (“Authority”) in terms of section 141 of the Financial Sector Regulation Act, 2017 (No. 9 of 2017) (“the FSR Act”), is to provide guidance on the –

- 1.1 requirements in terms of the Financial Advisory and Intermediary Services Act, 2002 (No. 37 of 2002) (“FAIS Act”) pertaining to the lapsing of a licence issued in terms of the FAIS Act and the duties of financial services providers (“FSP”), any key individual of the FSP, or another person in control of the affairs of the FSP, as the case may be;
- 1.2 interplay between sections 11(1)(d) and 38(d) of the FAIS Act dealing with the voluntary surrender of a licence and voluntary closure of business, respectively; and
- 1.3 effect of non-compliance with the requirements of the FAIS Act in relation to the lapsing of licences.

2. BACKGROUND

2.1 Section 11 of the FAIS Act deals with the lapsing of a licence and provides as follows:

- “(1) *A licence lapses -*
- (a) *where the licensee, being a natural person -*
 - (i) *becomes permanently incapable of carrying on any business due to physical or mental disease or serious injury;*
 - (ii) *is finally sequestered; or*
 - (iii) *dies;*
 - (b) *where the licensee, being any other person, is finally liquidated or dissolved;*

- (c) *where the business of the licensee has become dormant; and*
- (d) *in any other case, where the licensee voluntarily and finally surrenders the licence to the Authority.*

(2) *The Authority must be advised in writing by the licensee, any key individual of the licensee, or another person in control of the affairs of the licensee, as the case may be, of the lapsing of a licence and the reasons therefor and the Authority may make known any such lapsing of a licence by notice on the official web site and, if necessary by means of any other appropriate public media announcement.”*

- 2.2 The Authority has identified a recurring trend in terms of which financial services providers or responsible persons fail to comply with section 11(2) of the FAIS Act and/or abuse section 11(1)(d) of the FAIS Act by voluntarily surrendering licences in an attempt to avoid compliance with provisions of the FAIS Act (especially the General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003 (“General Code”)) and/or administrative actions.
- 2.3 The Authority is of the view that these abuses are often informed by a lack of understanding or misinterpretation of the FAIS Act. As a result, the Authority took the decision to issue this Guidance Notice on the application of section 11 of the FAIS Act.

3. REQUIREMENTS IN RESPECT OF THE LAPSING OF A LICENCE

3.1 Section 11(1) of the FAIS Act provides several grounds for the lapsing of a licence. Regardless of the ground for the lapse, there must be compliance with:

(a) section 11(2) of the FAIS Act (refer to par 2.1) and it is the responsibility of the persons identified in the section to notify the Authority within a reasonable period; and

(b) section 20(b) of the General Code which provides as follows:

“20. Subject to the Act, and sections 3(2) and (3) of this Code-

(a) ...;

(b) *a provider, other than a representative who ceases to operate as such, must immediately notify all affected clients accordingly and take, where reasonably necessary or appropriate in consultation with the clients and product suppliers concerned, reasonable steps to ensure that any outstanding business is completed promptly or transferred to another provider; and*

(c) ...”

3.2 The Authority may require proof of compliance with the requirements of the General Code upon receipt of a notification of the lapsing of a licence.

3.3 Before a licence may be voluntarily and finally surrendered as contemplated by section 11(1)(d), there must be compliance with the provisions of section 38(d) of the FAIS Act, which section deals with the voluntary closure of business of an FSP and provides as follows:

“No –

(d) *voluntary closure of business by,*

any authorised financial services provider, or representative of such provider, and no special resolution in terms of the constitution of such a provider or representative which is not a company, to close its business, have legal force -

- (i) unless a copy or notice thereof has been lodged with the Authority and the Authority has, by notice to the provider or representative concerned, as the case may be, declared that arrangements satisfactory to the Authority have been made to meet all liabilities under transactions entered into with clients prior to sequestration, winding-up or closure, as the case may be; or*
- (ii) if the Authority, by notice to the provider or representative concerned, as the case may be, declares that the application, resolution or closure, as the case may be, is contrary to this Act.”*

3.4 The case of the Louis Group (SA) Limited t/a Louis Group Financial Services v Registrar of Financial Services Providers A5/2015 provides support for the Authority’s approach. In this matter, the former Appeal Board of the Financial Services Board found that, if an FSP wishes to close its business and surrender its licence, it first has to comply with section 38(d)(i) of the FAIS Act and, only once it has received the Registrar’s (Authority’s) declaration, may it surrender the licence under section 11. Since, in that instance, the appellant failed to do so, the Appeal Board found that the surrender of the licence under section 11 was bad in law and the Registrar (Authority) was correct in discounting such surrender.

3.5 As stated, section 38(d)(ii) of the FAIS Act states that the closure of the business of an FSP will not have legal force if the Authority declares such closure as contrary to the FAIS Act. Attempts to avoid possible consequences of intended administrative action and any obligation under the FAIS Act are examples of the closure of business contrary to the FAIS Act.

4. EFFECT OF NON-COMPLIANCE

4.1 In respect of some of the grounds for lapsing referred to in section 11(1), a licence lapses upon the occurrence of an event, for example, the death of a sole proprietor. In such an instance, the licence lapses upon happening of the event, i.e. death of the sole proprietor. However, there must still be compliance with section 11(2) of the FAIS Act and section 20(b) of the General Code by the responsible persons.

4.2 Where an FSP, any key individual of the FSP, or another person in control of the affairs of the FSP, as the case may be, is required to comply with certain requirements prior to the lapsing of a licence (e.g. section 38(d) of the FAIS Act), and fails to do so, the lapse will, as in the case of the Louis Group (SA), be bad in law.

4.3 In such an instance, the Authority will discount the lapse of the licence and the FSP remains a regulated entity subject to the Authority’s regulatory oversight.

4.4 It should further be noted that if the lapsing of a licence is valid, but there has been non-compliance with a provision of the FAIS Act (e.g. section 11(2) of the FAIS Act or section 20(b) of the General Code), the Authority may still take administrative action in respect of such non-compliance by imposing an administrative penalty or issuing a directive.

5. CONCLUSION

- 5.1 FSPs, any key individual of the FSP, or another person in control of the affairs of the FSP, as the case may be, should take care to comply with the relevant requirements pertaining to the lapsing of licences dealt with above.
- 5.2 The Objective of the Authority is to, among other things, protect financial customers. In order to achieve this objective, the Authority must follow a pre-emptive approach to regulating supervised entities. To this end, the Authority cautions FSPs, any key individual of the FSP, or another person in control of the affairs of the FSP, as the case may be, against the abuse of section 11(1)(d) of the FAIS Act by voluntarily surrendering licences in order to avoid compliance with provisions of the FAIS Act and/or administrative action.



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DATE OF PUBLICATION: 25 November 2020